

December 24, 2002

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Reference No.: 03-0004

Ms. Claudia Riggs  
Advanced Safety Management Services, LLC  
P.O. Box 961  
Longmont, CO 80501

Dear Ms. Riggs:

This is in response to the appeal that you filed on behalf of your firm, Advanced Safety Management Services, LLC ("ASMS"). We have carefully reviewed the material from the Colorado Department of Regulatory Agencies ("CDORA") and have concluded that the denial of ASMS's certification as an eligible DBE under criteria set forth in 49 CFR Part 26 ("the Regulation") is supported by substantial evidence.

Your appeal is denied based upon a determination that substantial record evidence supports CDORA's conclusion that contributions of capital or expertise to acquire ownership interest by the disadvantaged owner was not real and substantial.

Your appeal is also denied based upon a determination that substantial record evidence supports CDORA's conclusion that ownership and control by you, the disadvantaged owner, is not real, substantial and continuing as required by 49 CFR Part 26.69 and 26.71; and that you do not possess nor exercise the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as major decisions on matters of management, policy and operations.

**How are burdens of proof allocated in the certification process? The Regulation provides that firms seeking DBE certification have the burden of demonstrating to the recipient, that they meet the requirements of the regulation for group membership, individual disadvantage, business size, ownership and control, by a preponderance of the evidence (more likely than not).** In reviewing all of the facts of record this office has concluded that ASMS failed to meet its burden, by a preponderance of the evidence, with regard to the ownership and control requirements of the Department's DBE regulation.

**1) The Regulation provides that contributions of capital or expertise by the**

**disadvantaged owner to acquire his/her ownership interest in the participating DBE**

**business be real and substantial.** ASMS is a firm that provides health and safety consulting services. The business was formed by Steve Clegg, a non-disadvantaged male in 1995 and operated as a sole proprietorship in his name until December 1999. Mr. Clegg filed articles of organization in Wyoming to restructure the business as a limited liability company. In June 2001, you, Mr. Clegg's wife, became the majority owner of the firm with Mr. Clegg retaining 49%. When he reorganized the business in 1999, Mr. Clegg transferred approximately \$45,000 to the new LLC. A receipt included in the record in the amount of \$10.00 appears to represent the extent of your contribution to assume a 50% ownership role in this business. Obviously, this transaction does not represent a real and substantial contribution pursuant to the Department's regulation.

The regulation does not allow ownership acquired by a gift or other transfer without adequate consideration from any non-disadvantaged individual who is involved in the same firm seeking certification to be counted for purposes of obtaining DBE certification. In this regard, the disadvantaged owner must show by clear and convincing evidence that the gift or transfer was made for reasons other than obtaining DBE certification. We agree with CDORA that you have failed to show that your contribution of capital or expertise to acquire your ownership interest was real and substantial.

In your rebuttal you state, "49 CFR 26.69(e) requires the contribution of capital or expertise by a firm's socially and economically disadvantaged owner to acquire their ownership interest to be real and substantial. Mr. Clegg did begin ASMS in 1995 and reorganized the business in December 1999. He reorganized this business based upon advice he received from his attorney... After I met Mr. Clegg in March 1999, I began working for him in administrative and marketing capacity. As ASMS continued its growth through increased marketing and productivity I had more and more responsibility for the company's growth. In July 2001 ASMS changed ownership to reflect ownership interest. My payment of \$10 was advised to us by the above-mentioned attorney, as legally our assets are joint property in the state of Colorado. We agree with CDORA's determination that you have failed to substantiate that your contributions of capital and expertise derived from your personal assets.

**2) The Regulation further requires that disadvantaged owners of participating DBE firms possess the power to control day-to-day and major decisions of their firms in critical matters.** The record evidence reveals that the individual associated with this firm who possesses the ability to control day to day activities of a business specializing in the health, safety management and consulting business is Mr. Clegg, your non-disadvantaged husband. Mr. Clegg has an undergraduate degree in [REDACTED] and over 18 years of experience in health and safety management and consulting. His many years of experience in the critical activities of this business (field supervision, bidding, estimating, etc.) include employment as an OSHA compliance officer, safety specialist, and safety manager. He also has expertise in industrial hygiene, training and instruction development of safety plans, exposure surveys and assessments.

The Department has also carefully considered your background and abilities as they relate to your ability to control this business. The regulation requires that DBE owners possess an overall

understanding of, and managerial and technical competence and experience directly related to the type of business in which the firm is engaged and the firm's operations. You have been employed as a teacher, librarian, and marketing specialist. Prior to meeting Mr. Clegg in 1995, you did not have any experience in the field of health and safety consulting. You joined ASMS as an employee in 1999. Your background clearly does not demonstrate that you have the ability to independently control ASMS' consulting operations.

The Department is also concerned about the disparity in the current salary paid to both you and Mr. Clegg by the firm. Your current salary is      while Mr. Clegg's salary is \$      . The record reveals that administrative work performed by you for clients is billed at \$      an hour while consulting work done by your husband is billed at \$      an hour.

The record evidence also reveals that ASMS is a family run and controlled business with you having responsibility for administrative and clerical tasks while your husband has the background and experience to control critical operations of the firm. Your rebuttal states, "49 CFR 26.71(e) While it is true Mr. Clegg has the technical expertise and is an exceptional safety professional, he is focusing on these talents and skills and working in the field on projects that allow him to use those particular skills. However, running a business is a cerebral industry. I do not have to possess the technical skills of my safety technicians and specialists in order to understand what they do or in order to secure future work for them. Any good manager knows their people and utilizes their skills wisely." The record is void of any information that substantiates that you have the ability to control, analyze and independently use technical information provided to you by subordinates. We agree with CDORA's determination that you do not possess the power to control day-to-day and major decisions of the firm in critical matters.

Based on these findings, we have determined that ASMS does not meet the requirements of the Department's Regulation 49 CFR Part 26.69 (a),(c),(e), and 26.71 (a),(b),(c),(d),(e),(f), (g), (j), and (k)(1), and (k)(2) which state, in part, as follows:

#### **26.69 What rules govern determinations of ownership?**

- (a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record, viewed as a whole.
- (c) The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.
- (e) The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note

payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

## **26.71 What rules govern determinations concerning control?**

- (a) In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.
- (b) Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.
  - (1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
  - (2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.
  - (3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.
  - (4) In considering factors related to the independence of a potential DBE firm, you must consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.
- (c) A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in 26.69(j)(2).
- (d) The socially and economically disadvantaged owners must possess the power to direct or

cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

- (1) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).
  - (2) In a corporation, disadvantaged owners must control the board of directors.
- (e) Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.
  - (f) The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policy making, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.
  - (g) The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policy making. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.
  - (j) In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

- (k)(1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-à-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.
- (2) If you cannot determine that the socially and economically disadvantaged owners -- as distinct from the family as a whole -- control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.
- (m) In determining whether a firm is controlled by its socially and economically disadvantaged owners, you may consider whether the firm owns equipment necessary to perform its work. However, you must not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

In summary, the information provided cumulatively supports a conclusion that ASMS does not meet the eligibility requirements as required for DBE certification under 49 CFR Part 26. The company is, therefore, ineligible to participate as a DBE on CDORA's Federal financially assisted projects. This determination is administratively final as of the date of this correspondence.

Sincerely,

Joseph E. Austin, Chief  
 External Policy and Program Development Division  
 Departmental Office of Civil Rights

cc: CDORA